United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 27, 2005

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Ralphs Grocery Company
Case 31-CA-27229 596-0420-5087
596-0420-5500

This case involves whether the Trust Fund's Section 8(a)(5) charge against Employer's failure to make Trust Fund contributions for employees rehired under false names and/or social security numbers is barred by Section 10(b). This case was resubmitted for advice because the Charging Party Trust Fund requested reconsideration of our prior conclusion that this charge is 10(b) barred.[1]

We affirm our prior conclusion. When the Trust Fund voted on August 10, 2004 to audit the Employer's contributions, the Fund should have known or at least reasonably suspected that the Employer was not making fund contributions. The Fund at that time clearly knew that the Employer had surreptitiously rehired unit employees under false names and/or social security numbers. This conduct was inconsistent with making fund contributions and also barred the Employer from making accurate fund contributions.

FACTS

This charge was filed on February 23, 2005; the Section 10(b) period thus began around August 23, 2004.

In brief, during the course of a multiemployer association strike/lockout which began in October 2003, the Employer surreptitiously rehired numerous locked out employees, using false names and/or social security numbers. Under the parties' expired bargaining agreement, the Employer was obligated to make Trust Fund contributions on behalf of these rehired unit employees. The Employer did not make any such contributions.

Soon after the lockout began, the Unions representing these employees filed Section 8(a)(3) and (5) charges alleging that the Employer's lockout was unlawful because

[1] See prior Advice Memorandum dated May 4, 2005.

the Employer had rehired unit employees under false names and/or social security numbers. The Regional Office began an investigation into whether the Employer's surreptitious rehiring made its lockout unlawful. Also in late 2003 or early 2004, the local US Attorney's Office began a criminal investigation into the Employer's rehiring of employees under false names and/or social security numbers.

At a Board of Trustees meeting on February 10, 2004, Union Trustees stated that they believed that some multiemployer association employers were employing unit employees during the lockout without making Trust Fund contributions. Union Trustees moved for a contributions audit of all three employers. The Employer Trustees opposed the motion for an audit. They noted that there was no evidence of any failure to make contributions, and that it would be imprudent and inefficient to spend Fund assets on a short-term audit. The Employer Trustees and Union Trustees deadlocked; no audit was authorized.

On July 27, 2004, the Employer's President wrote a letter to all employees stating that the Employer may have permitted locked out employees to work under false names and/or social security numbers. The letter stated that managers and supervisors who had engaged in such practice would be disciplined.

At a Board of Trustees meeting on August 10, 2004, Union Trustees renewed their motion for a contributions audit narrowing the audit to only the Employer. Union Trustee Leyva stated that the Employer's July 27 letter acknowledged that the Employer had recalled some locked out employees during the strike. Trustee Leyva also noted that the US Attorney was investigating the Employer for employing workers under false names and/or social security numbers. Trustee Leyva admitted that the Union Trustees did not have specific information on the number of employees allegedly recalled or rehired surreptitiously under false names and/or social security numbers. The Employer Trustees then reversed their opposition to an audit, and voted together with Union Trustees for the following resolution: "RESOLVED that in light of the acknowledgement by Ralphs that some locked out employees worked during the labor dispute . . . the Fund's auditors be instructed to conduct a contributions audit . . ."

On February 8, 2005, the Charging Party Trust Fund received an audit which confirmed that the Employer had failed to report the identities of unit employees working under false names and/or social security numbers; failed to report the hours these employees worked; and failed to pay contributions on the behalf of these employees. The Fund then filed this charge.

ACTION

When the Trust Fund voted on August 10 to audit the Employer's contributions, the Fund should have known or at least reasonably suspected that the Employer was not making contributions for rehired employees. The Fund at that time clearly knew that the Employer had surreptitiously rehired unit employees under false names and/or social security numbers. This conduct was inconsistent with making fund contributions and also barred the Employer from making accurate fund contributions.

Section 10(b) does not begin to run until the aggrieved party, using due diligence, "receives clear and unequivocal notice . . . either actual or constructive . . . of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows that his statutory rights have been violated."[2] "[I]t is knowledge of the act or event to be challenged that triggers Section 10(b); there is no requirement that an affected party have knowledge of all the circumstances leading up to, or surrounding, the event in issue."[3]

The Fund asserts that when it voted in August to conduct the audit, it did not have evidence establishing that the Employer was failing to make contributions. The Fund notes that the Employer's July 27 letter did not admit any failure to make contributions but only acknowledged surreptitious rehiring. We note, however, that Section 10(b) begins to run when an aggrieved party possesses facts which are "sufficient to create a suspicion that an unfair labor practice has occurred."[4] Thus the Fund's claimed lack

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[2] John Morrell, 301 NLRB 896, 899 (1991).

[3] R.P.C., Inc., 311 NLRB 232, 234 (1993)(knowledge of the fact of the union affiliation, alleged to be unlawful more than six months later, sufficient to trigger 10(b)).

[4] IBEW Local 25 (SMG), 321 NLRB 498 (1996); Amalgamated Transit Union 1433 (Phoenix Transit Systems), 335 NLRB 1263, note 2 (2001)(Section 10(b) began when the "Charging Party

of evidence establishing a failure of contributions, i.e., the lack of evidence of an actual violation of Section 8(a)(5), did not toll the running of Section 10(b).

The Fund asserts that its August 10 audit vote does not indicate that the Fund suspected that the Employer was not making contributions, because a trust benefit fund does not have to make a showing of a suspicion of wrongdoing in order to demand a contributions audit.[5] The Fund argues that the Employer's July 27 letter was not clear notice of a violation but instead constituted mere "inquiry notice", i.e., notice requiring the Fund to make inquiry into whether the Act was violated in an exercise of due diligence.[6] We conclude, however, that the facts surrounding the August 10 audit vote indicate that the Fund should have known, or at least clearly should have suspected, that the Employer was unlawfully failing to make fund contributions.

The Fund at the August 10 audit vote certainly knew that the Employer was surreptitiously rehiring employees under false names and/or social security numbers. The Employer President's letter referred to disciplining supervisors and managers who had engaged in this activity; the US Attorney was engaged in a criminal investigation into this activity; and the Regional Office, as a result of timely filed Union charges, was also investigating this activity. Based on these facts, the Fund should have known or at least reasonably suspected that the Employer was not making fund contributions.

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was on notice of facts that reasonably engendered suspicion that an unfair labor practice had occurred . . ."

[5] See Santa Monica Culinary Welfare Fund v. Miramar Hotel Corp., 920 F.2d 1491, 1495 (9th Cir. 1990).

[6] For this proposition, the Fund cites Hobson v. Wilson, 737 F.2d 1, 35 (DC Cir. 1984), a civil rights suit against the FBI and the DC government, where the Court found the fraudulent concealment of facts was sufficient to have tolled the applicable statute of limitations. The Court noted that a fraudulent concealment defense succeeds where a plaintiff did not have notice of facts sufficient to identify a particular cause of action but had only "hints, suspicions, hunches or rumors . . ." The Court then opined, in apparent dicta, that these factual circumstances would give rise to "inquiry notice", which would require the plaintiff to use due diligence to uncover the cause of action, but would not require the plaintiff to actually file suit.

The surreptitious nature of the Employer's behavior, intentionally concealing rehiring from the Unions, was totally inconsistent with making overt fund contributions. The Employer's fabrication of names and social security numbers, i.e., the Employer's willful failure to make social security payments, also was totally inconsistent with making fund contributions. More importantly, the Employer made Trust Fund payments by reporting the hours worked by named unit employees. Therefore, the Employer's rehiring under false names and/or social security numbers essentially barred the Employer from making accurate fund contributions. The Fund not only should have known, or at least reasonably suspected, that the Employer was not making contractually required fund contributions in these circumstances, the Fund could not have reasonably believed to the contrary.

We also note that the Employer Trustees in August acted as if they had come to agree with the Union Trustees' suspicion that the Employer was not making contributions. The Employer Trustees in February had refused to spend money for an audit because a short-term audit would be imprudent and inefficient in the ambiguous circumstances surrounding employer contributions. The Employer Trustees in effect were unwilling to spend money on an audit without some indication that an audit would reveal failed contributions. On August 10, however, after the Employer's "acknowledgement" of surreptitious rehiring under false names and/or social security numbers, the Employer Trustees reversed themselves and voted to spend money for an audit. The Employer Trustees' reversed spending decision indicates that all the Trustees had now come to believe, or at least to reasonably suspect, that the Employer was failing to make contributions.

Finally, we find Concourse Nursing Home, 328 NLRB 692 (1999) cited by the Fund to be distinguishable. There, the employer unilaterally discontinued making fund contributions for LPN nurses who comprised a portion of unit employees. The employer forwarded fund contributions for all the other unit employees without any explanation for its reduced contributions. When the fund received the employer's reduced contributions, it sent the employer standard "short notices" which the employer ignored. After the 10(b) period began, the employer finally admitted to the fund that its reduced contributions were a result of its exclusion of the LPNs. A Board majority found that the fund's Section 8(a)(5) charge attacking the excluded LPN contributions was timely filed.

The Board noted that the fund commonly received insufficient fund payments from employers. The Board thus held that the employer's making of reduced payments did not

establish that the fund "should have known that a cause of the shortfall was . . . exclusion of the LPNs." In contrast, the Fund here was not merely receiving reduced contributions with no apparent explanation. The Fund also knew that the Employer had surreptitiously rehired unit employees under false names and/or social security numbers. This unlawful conduct, then under criminal investigation, was not only inconsistent with fund contributions, it essentially barred the Employer from making accurate fund contributions.

Accordingly, we affirm our prior conclusion that complaint on this charge is 10(b) barred.

B.J.K.